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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOAN GORE MILLIGAN,
Individually and for the benefit and on behalf of all others similarly situated,
Petitioner,

v.

STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF REVENUE; MURIEL K. OFFERMAN, in her capacity as Secretary of the North Carolina Department of Revenue; RICHARD W. RIDDLE, in his capacity as Director of the Controlled Substance Tax Division of the North Carolina Department of Revenue; THE NORTH CAROLINA DEPARTMENT OF STATE TREASURER; HARLAN E. BOYLES, in his capacity as Treasurer of the State of North Carolina,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

Appendix to Petition for Writ of Certiorari

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No: COA99-14

TENTH DISTRICT
NORTH CAROLINA COURT OF APPEALS

****

From Wake County

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina,
Defendants.

(98-CVS-7891)
Entered: March 30, 2000

****

ORDER

The Motion to Dismiss the Appeal is Allowed and Petition for Discretionary Review to review the decision of the North Carolina Court of Appeals filed on the 7th day of

December 1999 was denied by order of the North Carolina Supreme Court on the 2nd day of March 2000, and same has been certified to the North Carolina Court of Appeals;

IT IS THEREFORE CERTIFIED to the Clerk of Superior Court Wake County North Carolina that the North Carolina Supreme Court has allowed the Motion to Dismiss the Appeal and denied the Petition for Discretionary Review filed by the Plaintiff in this cause.

WITNESS my hand and official seal this the 30th day of March 2000.

/s/_____
John H. Connell
Clerk, North Carolina Court of Appeals

/s/_____
Deputy Clerk, North Carolina Court of Appeals

Orig. to CSC
Copy to:
Mr. Scott F. Wyatt, Attorney at Law, For Joan G. Milligan
Mr. William E. Wheeler
Mr. Stanley F. Hammer
Ms. Norma S. Harrell,
Special Deputy Attorney General, For State of N.C.
Mr. Christopher E. Allen,
Assistant Attorney General, For State of N.C.

No: 37P00

SUPREME COURT OF NORTH CAROLINA

****

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina.
Defendants.

Scott F. Wyatt, for Milligan.
Stanley F. Hammer, for Milligan.
Norma S. Harrell, Special Deputy Attorney General,
for State.

Entered: March 2, 2000.

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiff in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

> "Allowed by order of the Court in conference,
> this the 2nd day of March 2000."
>
> /s/ Freeman, J.
> For the Court"

Upon consideration of the petition filed by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Denied by order of the Court in conference,
> this the 2nd day of March 2000."
>
> /s/ Freeman, J.
> For the Court"

N.C., 2000.

No: COA 99-14

TENTH DISTRICT
NORTH CAROLINA COURT OF APPEALS

****

From Wake County

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina,
Defendants.

(98-CVS-7891)
Entered: Dec. 7, 1999.

****

OPINION

Appeal by plaintiff from judgment filed 23 October 1998 by Judge B. Craig Ellis in Wake County Superior Court. Heard in the Court of Appeals 19 October 1999.

Attorney General Michael F. Easley, by Special Deputy Attorney General Norma S. Harrell, for the State. Wyatt Early Harris & Wheeler, L.L.P., by Scott F. Wyatt, William E. Wheeler, and Stanley F. Hammer, High Point, for plaintiff-appellant.

GREENE, Judge.

Joan Gore Milligan (Plaintiff), individually and for the benefit and on behalf of those similarly situated, appeals from an Order entering a Rule 12(b)(6) dismissal of the complaint filed against the State of North Carolina; the North Carolina Department of Revenue (Department of Revenue); Muriel K. Offerman, in her capacity as Secretary of the Department of Revenue; Richard W. Riddle, in his capacity as Director of the Controlled Substance Tax Division of the Department of Revenue; the North Carolina Department of State Treasurer; and Harlan E. Boyles, in his capacity as Treasurer of the *331 State of North Carolina (collectively, Defendants). Plaintiff's complaint requests refunds of taxes paid pursuant to Article 2D, Chapter 105 of the North Carolina General Statutes. N.C.G.S. ch. 105, art. 2D (1995) (amended 1997 & Supp.1998). These statutes were known as the "North Carolina Controlled Substance Tax" (Drug Tax).[1]

The allegations of the complaint reveal that on 8 December 1995, law enforcement officers seized marijuana from Plaintiff's home and arrested her for possession with intent to manufacture, sell, or deliver that same marijuana, as well as for maintaining both a place and a vehicle to keep controlled substances. On 23 September 1996, pursuant to N.C. Gen.Stat. § 105-113.111, the Department of Revenue assessed a tax liability of $12,252.95 against Plaintiff for taxes, penalties, and interest due on the approximately 2,227

[1] On 1 October 1997 the legislature substituted "Unauthorized Substances Taxes" for "Controlled Substance Tax" in the heading of Article 2D, Chapter 105.

grams of non-tax paid marijuana. Plaintiff paid the tax liability under protest and requested a refund pursuant to section 105-267. The refund was denied and Plaintiff filed her complaint contesting the validity of the tax. In the complaint it is alleged the Drug Tax is a "criminal penalty," "its enforcement must conform to the constitutional safeguards that accompany criminal proceedings," and Plaintiff was not provided any of these constitutional safeguards. It is also alleged that "Defendants have been the most aggressive of the states in enforcing [the] tax on illegal drugs."

The single issue is whether the Drug Tax is a criminal penalty.

Plaintiff argues that because the Drug Tax is a criminal penalty, its assessment and collection must comply with all the procedural safeguards required for criminal proceedings. It follows, Plaintiff contends, the statutes' failure to provide these safeguards requires a holding that the statutes are unconstitutional. We disagree.

A tax may be " 'so punitive either in purpose or effect' as to 'transfor [m] what [may have been] intended as a civil remedy into a criminal penalty.' " Hudson v. United States, 522 U.S. 93, 99, 118 S.Ct. 488, 493, 139 L.Ed.2d 450, 459 (1997) (citations omitted). If treated as a criminal penalty, "its enforcement must conform to the constitutional safeguards that accompany criminal proceedings." Lynn v. West, 134 F.3d 582, 593 (4th Cir.1998), cert. denied, 525 U.S. 813, 119 S.Ct. 47, 142 L.Ed.2d 36 (1998). Thus, the taxpayer would be entitled to "all of the criminal-procedure guarantees of the Fifth and Sixth Amendments." Id.

This Court has held that the Drug Tax does not contain the "punitive characteristics" necessary to transform it into a criminal penalty. State v. Ballenger, 123 N.C.App. 179, 184, 472 S.E.2d 572, 575 (1996), aff'd per curiam, 345 N.C. 626, 481 S.E.2d 84, cert. denied, 522 U.S. 817, 118 S.Ct. 68, 139 L.Ed.2d 29 (1997); see also State v. Adams, 132 N.C.App. 819, 513 S.E.2d 588, disc. review denied, 350

N.C. 836, --- S.E.2d ---- (1999); State v. Creason, 123 N.C.App. 495, 473 S.E.2d 771 (1996), aff'd per curiam, 346 N.C. 165, 484 S.E.2d 525 (1997).[2]

We acknowledge that our previous opinions on the Drug Tax were criminal proceedings whereas the present case is a civil proceeding. This distinction, however, is not material as the same issue is presented: whether the Drug Tax constitutes a criminal penalty. Because the Drug Tax does not constitute a criminal penalty, the Plaintiff was not entitled to the procedural safeguards required for criminal proceedings. Accordingly, *332 the trial court correctly dismissed the complaint.[3]

Affirmed.

Judges WALKER and HUNTER concur.

---

[2] We are aware the Fourth Circuit has held the North Carolina Drug Tax to constitute a criminal penalty. Lynn, 134 F.3d at 592. We are not, however, bound by that decision. Adams, 132 N.C.App. at 820, 513 S.E.2d at 589; see also State v. McDowell, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (state courts should treat "decisions of the United States Supreme Court as binding and accord[ ] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command").

[3] Plaintiff also argues the Drug Tax is unconstitutional "as applied." The single allegation in support of this claim is that the State has been "aggressive" in enforcing the tax on illegal drugs. This cannot support a claim that the statute is unconstitutional "as applied." This claim can be supported only upon a showing that the State has enforced the statute in some discriminatory or arbitrary manner. See generally Simeon v. Hardin, 339 N.C. 358, 451 S.E.2d 858 (1994); Grace Baptist Church v. City of Oxford, 320 N.C. 439, 358 S.E.2d 372 (1987); Kresge Co. v. Davis, 277 N.C. 654, 178 S.E.2d 382 (1971). There are no allegations that the State has engaged in any discriminatory or arbitrary practices with Drug Tax enforcement.

FILE NO. 98CvS 7891

NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY

****

Joan Gore MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
of the State of North Carolina,
Defendants.

Entered: October 23, 1998

****

ORDER AND JUDGMENT
OF DISMISSAL

This matter came on before the undersigned presiding judge in the Wake County Courthouse at a regularly

scheduled session of Wake County Superior Court on October 22, 1998. The matter was heard on defendants' motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to N.C.G.S. §1A-1, Rule 12(b)(6). Counsel for all parties were present and participated.

The Court having considered matters of record, including defendants' motion to dismiss and the parties' memoranda of law, and the Court having heard argument from counsel for all parties the court concludes that defendants are entitled to judgment as a matter of law and that the motion to dismiss should be allowed.

NOW, THEREFORE, it is hereby ORDRED, ADJUDGED, AND DECREED that defendants' motion to dismiss should be and hereby is allowed and that this action should be and hereby is dismissed in its entirety.

The parties stipulate that this Order and Judgment may be signed out of court, out of session, out of term, and out of county, if necessary.

This the 23 day of October, 1998.

/s/
B. Craig Ellis,
Superior Court Judge Presiding

FILE NO. 98CvS

NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY

****

JOAN GORE MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiff,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
Of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
Of the State of North Carolina,
Defendants.

Filed: July 6, 1998

****

COMPLAINT

JOAN GORE MILLIGAN, Plaintiff herein, individually and for the benefit and on behalf of all others similarly situated, complains of Defendants and alleges and says:

ALLEGATIONS RELATING TO NAMED PARTIES

1. Plaintiff is a resident of Leland, Brunswick County, North Carolina.
2. Upon information and belief, Defendant State of North Carolina is a sovereign state, a part of the United States of America and all matters complained of herein were and are being committed by virtue of the purported power and authority of said State officials, agents, employees, agencies, departments and instrumentalities thereof. Defendant State of North Carolina is legally responsible for the actions and conduct of its employees of the North Carolina Department of Revenue and the North Carolina Department of State Treasurer. Defendant State of North Carolina is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law.
3. Upon information and belief, Defendant North Carolina Department of Revenue is an agency or department of the State of North Carolina, is charged with the administration of state tax laws, is legally responsible for the actions and conduct of its employees of the North Carolina Department of Revenue, is located in Raleigh, Wake County, North Carolina, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law. Defendant North Carolina Department of Revenue is responsible for collecting and enforcing North Carolina's Controlled Substance Drug Tax, N.C. Gen. Stat. §§ 105-113.105 through 105-113.113 (hereinafter "Drug Tax").
4. Upon information and belief, Defendant Muriel K. Offerman is a resident of Wake County, North Carolina, and is Secretary of the North Carolina Department of Revenue in Raleigh, Wake County, North Carolina. In her official capacity, Defendant

Offerman is responsible for collecting and enforcing the Drug Tax, is responsible for the conduct and actions of the employees of the North Carolina Department of Revenue, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law. Defendant Offerman is, and would be, responsible for issuing refunds to taxpayers of taxes paid by such taxpayers from the enforcement and collection of the illegal and/or unconstitutional Drug Tax. Defendant Offerman has authority over the State Unauthorized Substances Tax Account pursuant to N.C. Gen. Stat. § 105-113.113 to allocate and refund all monies collected under the Drug Tax.

5. Upon information and belief, Defendant Richard W. Riddle is a resident of Wake County, North Carolina, and is Director of the Controlled Substances Tax Division (Authorized or Unauthorized) of the North Carolina Department of Revenue in Raleigh, Wake County, North Carolina. In his official capacity, Defendant Riddle is also responsible for collecting and enforcing the Drug Tax, is responsible for the conduct and actions of the employees of the Controlled Substances Tax Division of the North Carolina Department of Revenue, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law.

6. Upon information and belief, Defendant North Carolina Department of State Treasurer is an agency or department of the State of North Carolina, is responsible for maintaining and controlling funds generated by the Defendant North Carolina Department of Revenue, is legally responsible for the actions and conduct of its employees of the North Carolina Department of State Treasurer, is located in Raleigh, Wake County, North Carolina, and is capable of being sued in this action pursuant to N.C.

Gen. Stat. § 105-267 and other applicable statutes and law. Defendant North Carolina Department of State Treasurer is, and would be, responsible for issuing refunds to taxpayers of taxes paid by such taxpayers from the enforcement and collection of the illegal and/or unconstitutional Drug Tax.

7. Upon information and belief, Defendant Harlan E. Boyles is a resident of Wake County, North Carolina, and is Treasurer of the North Carolina Department of State Treasurer in Raleigh, Wake County, North Carolina. In his official capacity, Defendant Boyles is responsible for having custody and maintaining and controlling funds generated by the Defendant North Carolina Department of Revenue, is responsible for the conduct and actions of the employees of the North Carolina Department of State Treasurer, and is capable of being sued in this action pursuant to N.C. Gen. Stat. § 105-267 and other applicable statutes and law. Defendant Boyles is, and would be, responsible for issuing refunds to taxpayers of taxes paid by such taxpayers from the enforcement and collection of the illegal and/or unconstitutional Drug Tax.

FACTS

8. In 1989, the North Carolina General Assembly enacted into law the Drug Tax codified at N.C. Gen. Stat. §§ 105-113.105 et seq. The Drug Tax has been actively and aggressively enforced by Defendants since its enactment.

9. The Drug Tax imposes a special excise tax on "dealers," as that term is defined under the Drug Tax, who illegally possess a sufficient quantity of a "controlled substance," as that term is defined under the Drug Tax and/or North Carolina criminal law.

10. The Drug Tax requires drug dealers to submit a form reporting their illegal possession and to pay the tax. In return, dealers are supposed to receive stamps to affix to the drugs before they are resold.

11. Payment of the Drug Tax does not make possession or resale of illegal drugs legal.

12. Upon information and belief, no drug dealer as defined under the Drug Tax has ever filed a reporting form and voluntarily paid the Drug Tax.

13. Defendant North Carolina Department of Revenue often assigned responsibility for collection of the Drug Tax to Revenue Enforcement Officers in the Controlled Substance Tax Division of the North Carolina Department of Revenue.

14. North Carolina's Drug Tax has enough punitive features that its nature is that of a criminal penalty, not a civil tax, and therefore the Drug Tax is a criminal penalty as determined in Lynn v. West, 134 F.3d 582 (4th Cir. 1998).

15. Because the Drug Tax is in reality a criminal penalty, its enforcement must conform to the constitutional safeguards that accompany criminal proceedings. Defendants did not provide any of the constitutional safeguards that accompany criminal proceedings in its enforcement, assessment, and/or collection of the Drug Tax as heretofore or hereafter alleged.

16. Enforcing a criminal punishment in a civil proceeding is incompatible with the important constitutional distinctions between civil and criminal procedure.

17. Upon information and belief, Defendants have been the most aggressive of the states in enforcing its tax on illegal drugs. In 1993, for example, North Carolina collected over six million dollars ($6,000,000), more than ten times as much money as the next highest state, Kansas.

18. On or about December 8, 1995, law enforcement officers seized marijuana at the residence of Plaintiff Joan Gore Milligan.

19. On September 23, 1996 Defendant North Carolina Department of Revenue assessed a $12,252.95 total tax liability (representing unpaid taxes, penalties, and interest) against Plaintiff Joan Gore Milligan (hereinafter "Milligan" or "Plaintiff") under the Drug Tax. This Drug Tax assessment (hereinafter "Drug Tax assessment") was based upon a taxable quantity of 2227 grams of marijuana.

20. With regard to the same marijuana which was the subject of the Drug Tax assessment mentioned above in paragraph 19, Milligan was also arrested for possession with intent to manufacture, sell or deliver marijuana; maintaining a place to keep controlled substances; and maintaining a vehicle to keep controlled substances.

21. On October 21, 1996, Milligan filed a timely objection challenging the constitutionality of the Drug Tax assessment upon her.

22. On March 4, 1998, Milligan paid $8,000 as full payment on the Drug Tax assessment.

23. On March 26, 1998, Milligan timely and duly sent a written protest and demand (hereinafter "protest and demand") to Defendant Muriel K. Offerman, Secretary of the North Carolina Department of Revenue, for a refund of the $8,000 tax paid on March 4, 1998 pursuant to the Drug Tax assessment. This protest and demand cited the unconstitutionality of the Drug Tax, and was sent pursuant to, and fully complied with, N.C. Gen. Stat. § 105-267.

24. On or about April 8, 1998, Defendant Muriel K. Offerman, by and through Defendant Richard W. Riddle, responded to Milligan's protest and demand and indicated that no refund of the Drug Tax

assessment would be made pending the appeal of Lynn v. West, 134 F.3d 582 (4th Cir. 1998).

25. This cause of action is brought to recover monies rightfully belonging to Plaintiff, individually and to others similarly situated, which monies have been unlawfully collected by Defendant North Carolina Department of Revenue and paid into the State treasury and/or the State Unauthorized Substances Tax Account pursuant to N.C. Gen. Stat. § 105-113.113.

26. Plaintiff has been required to pay taxes on the Drug Tax assessment as a result of error, misinterpretation of law, invalid or unconstitutional acts, or otherwise, as herein alleged.

27. Defendants' failure to refund the taxes which Plaintiff paid on the Drug Tax assessment is wrongful and Plaintiff, individually and on behalf of all others similarly situated, are entitled to recover from Defendants all taxes paid on all assessments of the Drug Tax, plus interest and any and all applicable penalties and other assessments.

ALLEGATIONS RELATING TO PROPOSED CLASS

28. Plaintiff re-alleges the allegations contained in paragraphs 1 through 27 and incorporates the same by reference as if fully set out herein.

29. Those persons similarly situated as Plaintiff are persons who were arrested for drug crimes, were assessed a tax under the Drug Tax, and made payments under the Drug Tax.

30. This action is properly certifiable as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 23.

31. Plaintiff brings this action individually on behalf of herself and all other individuals similarly situated as herein alleged, including individuals who were

assessed and paid the Drug Tax but who did not file a demand for refund. The class which Plaintiff proposes to represent is composed of the following individuals:

> All individuals who were assessed and paid the Drug Tax.

32. The questions of law and fact herein are common to Plaintiff and all members of the proposed class.
33. The claims of the representative named Plaintiff are typical of the claims of unnamed members of the proposed class which Plaintiff seeks to represent.
34. The common relief sought by the named Plaintiff is effective and appropriate to the entire class adjudication of common questions of law, and proof of the common questions of law and fact will be dispositive of the rights of each and every member of the proposed class.
35. The named Plaintiff will fairly and adequately represent and protect the interests of the members of the class she proposes to represent and her counsel is experienced in the prosecution of complex litigation and in litigation of constitutional and other claims.
36. Defendants have acted and refused to act on grounds generally applicable to the entire proposed class by their enforcement of the unlawful and unconstitutional Drug Tax.
37. A class action is superior to other available methods for the fair and efficient adjudication of this controversy in that a class action can be easily managed and will permit the adjudication of numerous individual claims in one forum and will conserve the resources of all parties and the Court. Many of the proposed class members may not be aware of their rights against Defendants and many are believed to be in a financial position which makes

it difficult, if not impossible, for them to assert their rights individually. The desirability of concentrating controversy in a single forum outweighs any interest of individual members of the proposed class in individually controlling the prosecution of his or her claims.

FIRST CLAIM FOR RELIEF
(STATE CONSTITUTIONAL CLAIMS)

38. Plaintiff re-alleges the allegations contained in paragraphs 1 through 37 and incorporates the same by reference as if fully set out herein.

39. That the Drug Tax and the actions of Defendants alleged herein are invalid, void, and unconstitutional in that they violate:

A. N.C. Const. art. I., Sec. 19 for the reason that they amount to a taking of property without just compensation, are arbitrary and capricious, and confiscatory, are in violation of due process, equal protection, are in violation of rights afforded to defendants accused of crimes in North Carolina, and violate the state constitutional safeguards that accompany criminal proceedings;

B. N.C. Const. art. I, Sec. 22 for the reason that they do not afford the proper modes of prosecution for individuals charged with crimes, and violate the state constitutional safeguards that accompany criminal proceedings;

C. N.C. Const. art. I, Sec. 23 for the reason that they violate rights afforded to individuals accused of crimes in North Carolina, and violate the state constitutional safeguards that accompany criminal proceedings;

D. N.C. Const. art. I, Sec. 24 for the reason that they violate rights afforded to individuals accused of crimes in North Carolina, and violate the state constitutional safeguards that accompany criminal proceedings;

E. N.C. Const. art. I, Sec. 27 for the reason that they are in violation of the prohibition against the imposition of excessive fines or an unusual punishment;

F. N.C. Const. art. I, Sec. 6 for the reason that they violate the proper delegation of power between the executive branch of state government, legislative branch of state government, and judicial branch of state government;

G. N.C. Const. art. I, Sec. 5 for the reason that they violate the United States Constitution as hereinafter mentioned and thereby violate the North Carolina Constitution.

SECOND CLAIM FOR RELIEF
(FEDERAL CONSTITUTIONAL CLAIMS)

40. Plaintiff re-alleges the allegations contained in paragraphs 1 through 39 and incorporates the same by reference as if fully set out herein.

41. That the Drug Tax and the actions of Defendants alleged herein are invalid and void because they violate the United States Constitution in that they amount to a taking of property without just compensation, are arbitrary and capricious, and confiscatory, are in violation of due process, equal protection, impose excessive fines or an unusual punishment, are in violation of rights afforded to defendants accused of crimes, and violate the federal constitutional safeguards that accompany criminal proceedings.

THIRD CLAIM FOR RELIEF
(CLAIMS OF ALL INDIVIDUALS WHO PAID THE DRUG TAX FOR RETURN OF ANY AND ALL MONIES HERETOFORE OR HEREAFTER ILLEGALLY COLLECTED)

42. Plaintiff re-alleges the allegations contained in paragraphs 1 through 41 and incorporates the same by reference as if fully set out herein.

43. This action is brought to recover any and all monies, rightfully belonging to Plaintiff and all others similarly situated, being the class she seeks to represent, which monies have been unlawfully collected and are being unlawfully collected by the Defendants pursuant to the Drug Tax and since its enactment into law. The Court has jurisdiction to determine this matter, and that all conditions precedent to this Court's jurisdiction to order the refund of such taxes or order other relief have been performed.

44. Plaintiffs institute the present action challenging Defendants' past, present, and/or future taxation under the Drug Tax since its enactment. The past, current, or future taxation under the Drug Tax violated, violates, and/or will violate both the federal and state constitutions as alleged herein.

FOURTH CLAIM FOR RELIEF
(DECLARATORY JUDGMENT AND WRIT OF MANDAMUS)

45. Plaintiff re-alleges the allegations contained in paragraphs 1 through 44 and incorporates the same by reference as if fully set out herein.

46. As a result of the foregoing, Plaintiff and all others similarly situated are entitled to a declaratory judgment determining: that the Drug Tax and/or the

actions of Defendants violate the North Carolina and/or United States Constitutions; that Plaintiff and all others similarly situated are entitled to a full refund of any and all monies paid pursuant to the Drug Tax; and for such other and further relief Plaintiffs may have pursuant to the provisions of the North Carolina Declaratory Judgment Act.

47. Additionally, in view of the foregoing, Plaintiff and all others similarly situated are entitled to a Writ of Mandamus requiring Defendants to comply with the law and refund any and all monies to Plaintiff and all others similarly situated which were paid pursuant to the Drug Tax.

WHEREFORE, Plaintiff prays on her behalf and on behalf of all others similarly situated as follows:

1. For certification as a class pursuant to N.C. Gen. Stat. § 1A-1, Rule 23.
2. A Declaration that the Drug Tax and/or the actions of Defendants alleged herein violate the North Carolina Constitution and recovery therefor;
3. A Declaration that the Drug Tax and/or the actions of Defendants alleged herein violate the United States Constitution and recovery therefor;
4. A Declaratory Judgment, pursuant to N.C. Gen. Stat. § 1-253 et seq., that the Drug Tax and the actions of Defendants are void, invalid, and have no force and effect as herein alleged and recovery therefor;
5. A Writ of Mandamus requiring Defendants or anyone acting by, through, under, or in concert therewith, to repay and refund any and all monies paid pursuant to the Drug Tax;

6. A full return to Plaintiff and all others similarly situated of any and all monies heretofore or hereafter illegally collected or paid pursuant to the Drug Tax as alleged herein and interest as by law provided;
7. Such attorneys' fees as the law may allow;
8. That the costs of this action be taxed against Defendants;
9. For such other relief as may be justified.

This the _____ day of July, 1998.

WYATT EARLY HARRIS & WHEELER, L.L.P.
Attorneys for Plaintiffs

By:/s/_____
SCOTT F. WYATT (State Bar No. 18754)
For the Firm

By:/s/_____
WILLIAM E. WHEELER (State Bar No. 6917)
For the Firm

By:/s/_____
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OF COUNSEL:

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FILE NO. 98CvS 7891

NORTH CAROLINA
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY

****

JOAN GORE MILLIGAN,
Individually and for the benefit and on
behalf of all others similarly situated,
Plaintiffs,

v.

STATE of North Carolina;
The North Carolina Department of Revenue;
Muriel K. Offerman, in her capacity as Secretary
Of the North Carolina Department of Revenue;
Richard W. Riddle, in his capacity as Director
of the Controlled Substance Tax Division
of the North Carolina Department of Revenue;
The North Carolina Department of State Treasurer;
Harlan E. Boyles, in his capacity as Treasurer
Of the State of North Carolina,
Defendants.

Entered: September 23, 1998

****

AMENDMENT TO COMPLAINT
AS OF RIGHT

COMES NOW Plaintiff, Joan Gore Milligan, Individually and for the benefit and on behalf of all others

similarly situated, by and through the undersigned counsel and pursuant to Rule 15(a) amends as of right and before services of any responsive pleading by Defendants, her Complaint as follows:

1. Plaintiff's initial Complaint is incorporated herein by reference as if fully set forth herein.

2. Plaintiffs adds the following paragraph to her complaint, following Paragraph 39:

   39.1 Upon information and belief, Defendants State of North Carolina and the North Carolina Department of Revenue and all of the defendants have ceased efforts at collecting the drug tax since the decision in *Lynn v. West*, 134 F. 3d 582 (4th Cir. 1998), Petition for Certiorari pending, U.S. Supreme Court, No. 97-1829, and are therefor estopped to deny that the drug tax is unconstitutional.

This the 3rd day of September, 1998.

WYATT EARLY HARRIS & WHEELER, L.L.P.
Attorneys for Plaintiffs

By:/s/
SCOTT F. WYATT (State Bar No. 18754)
For the Firm

By:/s/
WILLIAM E. WHEELER (State Bar No. 6917)
For the Firm

By:/s/_____
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N.C. Gen. Stat. § 105-113.105 (1996)

Purpose.

The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.106 (1996)

Definitions.

The following definitions apply in this Article:

(1) Controlled Substance. -- Defined in G.S. 90-87.

(2) Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

(3) Dealer. -- A person who actually or constructively possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight.

(4) Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

(4a) Reserved.

(4b) Reserved.

(4c) Low-street-value drug. -- Any of the following controlled substances:

a. An anabolic steroid as defined in G.S. 90-91(k).

b. A depressant described in G.S. 90-89(d), 90-90(d), 90-91(b), or 90- 92(a).

c. A hallucinogenic substance described in G.S. 90-89(c) or G.S. 90-90(e).

d. A stimulant described in G.S. 90-89(e), 90-90(c), 90-91(j), 90-92(d), or 90-93(a)3.

e. A controlled substance described in G.S. 90-91(c), (d), or (e), 90- 92(c), (e), or (f), or 90-93(a)1.

(5) Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

(6) Marijuana. -- All parts of the plant of the genus Cannabis, whether growing or not; the seeds of this

plant; the resin extracted from any part of this plant; and every compound, salt, derivative, mixture, or preparation of this plant, its seeds, or its resin.

(7) Person. -- Defined in G.S. 105-228.90.

(8) Secretary. -- Defined in G.S. 105-228.90.

(1989, c. 772, s. 1; 1993, c. 354, s. 10; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.107 (1996)

Excise tax on controlled substances.

An excise tax is levied on controlled substances possessed, either actually or constructively, by dealers at the following rates:

(1) At the rate of forty cents (40 cents) for each gram, or fraction thereof, of harvested marijuana stems and stalks that have been separated from and are not mixed with any other parts of the marijuana plant.

(1a) At the rate of three dollars and fifty cents ($3.50) for each gram, or fraction thereof, of marijuana, other than separated stems and stalks taxed under subdivision (1) of this section.

(2) At the rate of two hundred dollars ($200.00) for each gram, or fraction thereof, of any other controlled substance that is sold by weight.

(2a) At the rate of fifty dollars ($50.00) for each 10 dosage units, or fraction thereof, of any low-street-value drug that is not sold by weight.

(3) At the rate of four hundred dollars ($400.00) for each 10 dosage units, or fraction thereof, of any other controlled substance that is not sold by weight.

A quantity of marijuana or other controlled substance is measured by the weight of the substance whether pure or impure or dilute, or by dosage units when the substance is not sold by weight, in the dealer's possession. A quantity of a controlled substance is dilute if it consists of a detectable quantity of pure controlled substance and any excipients or fillers.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.107A (1996)

Exemptions.

(a) Authorized Possession. -- The tax levied in this Article does not apply to a controlled substance in the possession of a dealer who is authorized by law to possess the substance. This exemption applies only during the time the dealer's possession of the substance is authorized by law.

(b) Certain Marijuana Parts. -- The tax levied in this Article does not apply to the following marijuana:

(1) Harvested mature marijuana stalks when separated from and not mixed with any other parts of the marijuana plant.

(2) Fiber or any other product of marijuana stalks described in subdivision (1) of this subsection, except resin extracted from the stalks.

(3) Marijuana seeds that have been sterilized and are incapable of germination.

(4) Roots of the marijuana plant.

(1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.108 (1996)

Reports; revenue stamps.

The Secretary shall issue stamps to affix to controlled substances to indicate payment of the tax required by this Article. Dealers shall report the taxes payable under this Article at the time and on the form prescribed by the Secretary. Dealers are not required to give their name, address, social security number, or other identifying information on the form. Upon payment of the tax, the Secretary shall issue stamps in an amount equal to the amount of the tax paid. Taxes may be paid and stamps may be issued either by mail or in person.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.109 (1996)

When tax payable.

The tax imposed by this Article is payable by any dealer who actually or constructively possesses a controlled substance in this State upon which the tax has not been paid, as evidenced by a stamp. The tax is payable within 48 hours after the dealer acquires actual or constructive possession of a non-tax- paid controlled substance, exclusive of Saturdays, Sundays, and legal holidays of this State, in which case the tax is payable on the next working day. Upon payment of the tax, the dealer shall permanently affix the appropriate stamps to the controlled substance. Once the tax due on a controlled substance has been paid, no additional tax is due under this Article even though the controlled substance may be handled by other dealers.

(1989, c. 772, s. 1; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.110 (1996)

Repealed by Session Laws 1995, c. 340, s. 1, effective October 1, 1995.

N.C. Gen. Stat. § 105-113.110A

Interest and penalty.

The tax due under this Article shall bear interest at the rate established pursuant to G.S. 105-241.1(i) from the date due until paid. In addition, a dealer who neglects, fails, or refuses to pay the tax due under this Article is liable for a penalty equal to fifty percent (50%) of the tax.

(1989 (Reg. Sess., 1990), c. 814, s. 7; 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.111 (1996)

Assessments.

Notwithstanding any other provision of law, an assessment against a dealer who possesses a controlled substance to which a stamp has not been affixed as required by this Article shall be made as provided in this section. The Secretary shall assess a tax, applicable penalties, and interest based on personal knowledge or information available to the Secretary. The Secretary shall notify the dealer in writing of the amount of the tax, penalty, and interest due, and demand its immediate payment. The notice and demand shall be either mailed to the dealer at the dealer's last known address or served on the dealer in person. If the dealer does not pay the tax, penalty, and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty, and interest pursuant to the procedure set forth in G.S. 105- 241.1(g) for jeopardy assessments or the procedure set forth in G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer, unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty, and interest. The Secretary shall use all means available to collect the tax, penalty, and interest from any property in which the dealer has a legal, equitable, or beneficial interest. The dealer may seek review of the assessment as provided in Article 9 of this Chapter.

(1989, c. 772, s. 1; 1989 (Reg. Sess., 1990), c. 1039, s. 2; 1991 (Reg. Sess., 1992), c. 900, s. 20(d); 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-113.112 (1996)

Confidentiality of information.

Notwithstanding any other provision of law, information obtained pursuant to this Article is confidential and may not be disclosed or, unless independently obtained, used in a criminal prosecution other than a prosecution for a violation of this Article. Stamps issued pursuant to this Article may not be used in a criminal prosecution other than a prosecution for a violation of this Article. A person who discloses information obtained pursuant to this Article is guilty of a Class 1 misdemeanor. This section does not prohibit the Secretary from publishing statistics that do not disclose the identity of dealers or the contents of particular returns or reports.

(1989, c. 772, s. 1; 1993, c. 539, s. 702; 1994, Ex. Sess., c. 24, s. 14(c).)

N.C. Gen. Stat. § 105-113.113 (1996)

Use of tax proceeds.

(a) Special Account. -- The Secretary shall credit the proceeds of the tax levied by this Article to a special nonreverting account, to be called the State Controlled Substances Tax Account, until the tax proceeds are unencumbered. The Secretary shall remit the unencumbered tax proceeds as provided in this section on a quarterly or more frequent basis. Tax proceeds are unencumbered when either of the following occurs:

(1) The tax has been fully paid and the taxpayer has no current right under G.S. 105-267 to seek a refund.

(2) The taxpayer has been notified of the final assessment of the tax under G.S. 105-241.1 and has neither fully paid nor timely contested the tax under G.S. 105-241.1 through G.S. 105-241.4 or G.S. 105-267.

(b) Distribution. -- The Secretary shall remit seventy-five percent (75%) of the part of the unencumbered tax proceeds that was collected by assessment to the State or local law enforcement agency that conducted the investigation of a dealer that led to the assessment. If more than one State or local law enforcement agency conducted the investigation, the Secretary shall determine the equitable share for each agency based on the contribution each agency made to the investigation. The Secretary shall credit the remaining unencumbered tax proceeds to the General Fund.

(c) Refunds. -- The refund of a tax that has already been distributed shall be drawn initially from the State

Controlled Substances Tax Account. The amount of refunded taxes that had been distributed to a law enforcement agency under this section and any interest shall be subtracted from succeeding distributions from the Account to that law enforcement agency. The amount of refunded taxes that had been credited to the General Fund under this section and any interest shall be subtracted from succeeding credits to the General Fund from the Account.

(1991 (Reg. Sess., 1992), c. 900, s. 20(c); 1995, c. 340, s. 1.)

N.C. Gen. Stat. § 105-267 (1996)

Taxes to be paid; suits for recovery of taxes.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded. The protest period for all other taxes is one year after payment.

The suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefore with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State. G.S. 105-241.2 provides an alternate procedure for a taxpayer to contest a tax and is not in conflict with or superseded by this section.

(1939, c.158, s.936; 1955, c.1350, s.15; 1957, c.1340, s.10; 1977, c. 946, s.1; 1996, 2nd Ex. Sess., c.14, s.10.1.)

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEVAN ANDERSON,
Defendant-Appellant.

No. 98-4658

Argued: April 6, 2000
Decided: May 15, 2000
Entered: May 15, 2000

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern. Terrence W. Boyle, Chief District Judge. (CR-97-34-BO- 1)

Before WILKINSON, Chief Judge, MOTZ, Circuit Judge, and HAMILTON, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Douglas Everette Kingsbery, THARRINGTON SMITH, L.L.P., Raleigh, North Carolina, for Appellant. John Howarth Bennett, Assistant United States Attorney, Raleigh, North Carolina, for Appellee. F. Hill Allen,

THARRINGTON SMITH, L.L.P., Raleigh, North Carolina, for Appellant. Janice McKenzie Cole, United States Attorney, Anne M. Hayes, Assistant United States Attorney, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Jevan Anderson was convicted under 21 U.S.C. s 846 for conspiracy to distribute or possess with intent to distribute crack cocaine. On appeal, Anderson contends that the government presented insufficient evidence to support his conviction. Finding no merit to this contention, we affirm. Anderson also challenges his sentencing on a number of grounds. For the reasons set forth below, we affirm his sentence in part and vacate in part. We remand for resentencing under the applicable sentencing guidelines.

I.

In 1997, the Drug Enforcement Administration Mobile Enforcement Team conducted an investigation in Kinston, North Carolina. Jevan Anderson was one of the targets of this investigation. In November1997, Anderson was arrested and charged under 21 U.S.C. § 846 for conspiracy to distribute or possess with intent to distribute crack cocaine. Trial commenced on August 24, 1998. Government cooperating witnesses Kenya Jackson, Odell Caracter, and Carlos Ramos all testified to selling substantial amounts of crack cocaine to Anderson on multiple occasions. Jackson and Caracter also spoke of the close relations between Anderson and Sheridon Outlaw with respect to the

drug trade. A paid government informant likewise testified. He recalled purchasing crack cocaine from Anderson on two separate occasions. Another of the government's witnesses, Shontelle Poole, also testified to making two crack cocaine purchases from Anderson. In addition, Poole stated that Anderson sold crack cocaine "every day."

DEA Special Agent Eric Kolbinsky then testified about the DEA searches of the house where Anderson sold drugs and the house where Anderson resided. While the DEA agents found no drugs, they did find a set of electronic scales. Kolbinsky testified that such devices are commonly used for weighing drugs. In Anderson's bedroom, the DEA discovered $11,825 in cash. Some of the currency was bundled in $1000 amounts. Kolbinsky testified that such bundling is very common in the narcotics trade. Anderson offered no evidence and filed a motion to dismiss. The district court denied his motion. The jury then found Anderson guilty on the single conspiracy count.

On January 13, 1999, the district court held Anderson's sentencing hearing. The court found that Anderson was responsible for over 1,176 grams of crack cocaine plus a specified amount of powder cocaine which yielded a base offense level of 36. When combined with Anderson's criminal history category of IV, a guidelines sentencing range of 262 to 327 months resulted.

The court then addressed the government's request to enhance Anderson's sentence to a mandatory term of life imprisonment pursuant to 21 U.S.C. s 841(b)(1)(A). The court concluded that Anderson had been convicted of two prior drug felonies, as required by s 841(b)(1)(A). As a result, the court sentenced Anderson to life in prison. Anderson now appeals both his conviction and sentencing. We address his claims in turn.

II.

Anderson argues that the evidence submitted by the government at trial was insufficient to support his conviction under § 846. Anderson specifically claims that the government did not prove that he was conspiring with others in furtherance of his drug trade. See United States v. Burgos, 94 F.3d 849, 858 (4th Cir.1996) (en banc) ("[I]n addition to proving the existence of a conspiracy beyond a reasonable doubt, the Government must also prove a defendant's connection to the conspiracy beyond a reasonable doubt.").

We disagree. "When assessing the sufficiency of the evidence of a criminal conviction on direct review, '[t]he verdict of [the] jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.' "

United States v. Mitchell, No. 99-4008, 2000 WL 309298, at *5 (4th Cir.Mar. 27, 2000) (quoting Glasser v. United States, 315 U.S. 60, 80 (1942)). Viewing the evidence in the light most favorable to the government, we conclude that there is substantial evidence that Anderson conspired with others to distribute crack cocaine.

Kenya Jackson and Odell Caracter both testified that Anderson acted in concert with Sheridon Outlaw. Jackson testified that the two men were frequently seen together and that Jackson jointly sold them drugs. Furthermore, Jackson described Outlaw as a "partner" of Anderson's. And Caracter recalled that Anderson and Outlaw were always together when he sold drugs to Outlaw.

Kenya Jackson also testified that on three occasions he sold Anderson a total of 482 grams of crack cocaine. See United States v. Mills, 995 F.2d 480, 485 n.1 (4th Cir.1993) ("[W]e believe evidence of a buy-sell transaction, when coupled with a substantial quantity of drugs, would support a reasonable inference that the parties were coconspirators."). Odell Caracter and Carlos Ramos testified that they met

Anderson through Jackson. Caracter sold Anderson over 510 grams of crack cocaine, and Ramos sold Anderson over 170 grams. The government's evidence also showed that Anderson used the services of Shontelle Poole in furtherance of his drug business. For example, Poole took Anderson to the Washington, D.C., area to purchase drugs. For her services, Poole was compensated with crack cocaine. The testimony of all of these witnesses provides substantial evidence that Anderson did in fact conspire with others to distribute crack cocaine.

III.

A. With respect to sentencing, Anderson first contends that the district court clearly erred in calculating the amount of drugs attributable to him in determining his base offense level under the guidelines. Anderson initially asserts that the government did not adequately prove that the drugs referenced in Anderson's presentence report were part of the s 846 conspiracy. The government bears the burden of proving that drugs are attributable to a defendant by a preponderance of the evidence, see United States v. Lamarr, 75 F.3d 964, 972 (4th Cir.1996), and evidence introduced at trial can be used to satisfy this burden, see United States v. Williams, 986 F.2d 86, 90-91 (4th Cir.1993). The government introduced evidence at trial showing that Jackson, Caracter. and Ramos all sold substantial amounts of crack cocaine to Anderson--an amount totaling over 1,162 grams. The government's evidence also showed that Jackson introduced Anderson to both Caracter and Ramos. Based on this evidence, we cannot conclude that the district court clearly erred by concluding that these amounts of drugs were connected to a single conspiracy.

Anderson also contends that the district court clearly erred in attributing to him the 1,000 grams of the so-called "fish scale" cocaine. The error, if any, is clearly harmless. As Anderson concedes, the district court did not count the

"fish scale" cocaine as crack cocaine, but rather as powder cocaine. Thus, the district court's crack cocaine total of 1,176.525 grams is unaffected. This quantity of crack cocaine is more than enough for base offense level 36 to apply to Anderson. See U.S. Sentencing Guidelines Manual § 2D1.1(c)(2)(1998) (Level 36 applies to offenses involving at least 500 grams but less than 1,500 grams of crack cocaine.).

B. Anderson next contends that the district court erred by applying the 21U.S.C.§841(b)(1)(A) life imprison-ment sentencing enhancement to him. Section 841(b)(1)(A) provides, "If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release...."

Anderson initially contends that because § 841(b)(1)(A) does not explicitly refer to § 846, this enhancement cannot apply to his § 846 conviction. While Anderson is correct in noting that s 841(b)(1)(A) does not explicitly list s 846, s 846 itself states, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." (emphasis added). In this case, the object of Anderson's conspiracy was violating § 841, which makes it illegal to distribute crack cocaine. Because §846 adopts the §841 penalty structure in full, the §841(b)(1)(A) life imprisonment enhancement can be applied to Anderson's §846 convic-tion.

Anderson contends, however, that one of the two prior felony drug convictions relied on by the government cannot count as a predicate offense under §841 (b)(1)(A). See 21 U.S.C. §851(c). He argues that his 1996 North Carolina felony drug conviction was obtained in violation of the Constitution's prohibition against double jeopardy.

Anderson notes that prior to his North Carolina conviction, the state assessed and collected a portion of its drug tax against him with respect to the very drugs at issue in his conviction--a fact the government has not disputed. See N.C. Gen.Stat. §§105-113.105 to 105-113.113 (1999). Anderson then notes that this circuit has held North Carolina's drug tax to constitute a criminal penalty for purposes of the Double Jeopardy Clause. See Lynn v. West, 134 F.3d 582, 588-93 (4th Cir.), cert. denied, 119 S.Ct. 47 (1998). As a result of the drug tax being a criminal penalty, Anderson argues, his subsequent state conviction violated the Double Jeopardy Clause.

The government argues that Anderson waived this claim. While we agree with the government that a double jeopardy claim can, at least in some circumstances, be waived, see United States v. Broce, 488 U.S. 563 (1989), we cannot conclude that there has been a waiver in this case. Anderson cannot be said to have waived his double jeopardy claim as it simply would have been futile for Anderson to have raised this claim in state court. Prior to Anderson's conviction on the drug charge, North Carolina courts had determined that the North Carolina drug tax was not a criminal penalty for purposes of the Double Jeopardy Clause. See State v. Ballenger, 472 S.E.2d 572, 572-75 (N.C.Ct.App.1996), aff'd per curiam, 481 S.E.2d 84, cert. denied, 522 U.S. 817 (1997); State v. Creason, 473 S.E.2d 771, 772 (N.C.Ct.App.1996), aff'd per curiam, 484 S.E.2d 525 (1997). A subsequent North Carolina case even pointed out that state courts were not bound by the Fourth Circuit Lynn v. West decision, but rather were bound by the state court pronouncements on the matter. See State v. Adams, 513 S.E.2d 588, 589 (N.C.Ct.App.1999).

In this forum, to say the least, Lynn v. West is binding. And pursuant to Lynn v. West, Anderson's subsequent North Carolina drug conviction constituted double jeopar-dy. As a result, the conviction cannot be used as a predicate offense under s 841(b)(1)(A). We thus

vacate Anderson's sentence and remand for resentencing under the applicable sentencing guidelines.

IV.

For the foregoing reasons, we affirm Anderson's conviction and affirm his sentence in part and vacate in part. We remand for resentencing under the applicable sentencing guidelines.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED